

This is a claim for a July 14, 1995 accident. The Judge found that claimant had a 34 percent whole body functional impairment and awarded claimant a permanent partial

general disability based on that rating followed by a permanent total disability commencing February 1, 1997.

Respondent and its insurance carrier contend the Judge erred. They argue that claimant's award should be reduced to a 17 percent permanent partial general disability based upon a lower functional impairment rating. Further, they request the Appeals Board to confirm that they are to receive credit for the wages that respondent paid claimant while he was off work.

Conversely, claimant contends the award should be affirmed.

The only issues before the Board on this appeal are:

1. Did the Judge err by denying the request to quash the deposition of Dr. Theodore A. Moeller?
2. What is the nature and extent of claimant's injury and disability?

#### **FINDINGS OF FACT**

After reviewing the entire record, the Board finds:

1. On July 14, 1995, Mr. Bauer was injured when three tiers of scaffolding toppled over, striking him. In addition to being struck on the head, the scaffolding lacerated his right hand, fractured two of his fingers on his right hand, and fractured two toes on his left foot. The parties stipulated that the accident arose out of and in the course of Mr. Bauer's employment with Utility Contractors.
2. Mr. Bauer was immediately taken to the hospital by ambulance. Mr. Bauer was initially treated in the emergency room and then hospitalized for approximately five days. In the emergency room, orthopedic surgeon Michelle A. Klaumann began treating Mr. Bauer's hand and foot. Because he began experiencing bad headaches, which prevented him from sitting up and caused him to vomit, Dr. Klaumann referred Mr. Bauer to Dr. Paul Stein, a neurosurgeon, and to Dr. Olmstead, a neurologist.
3. Dr. Klaumann also referred Mr. Bauer to Dr. Harry A. Morris who operated on Mr. Bauer's fingers in January 1996.
4. After Dr. Morris released him to work, Mr. Bauer returned to work for Utility Contractors but began having problems with his balance and began feeling weak and dizzy. Dr. Leslie Ruthven, a neuropsychologist and president of the behavioral health management firm with which Utility Contractors was associated, determined that Mr. Bauer was having memory problems. Dr. Ruthven thought Mr. Bauer might have a closed head

injury; therefore, the doctor referred Mr. Bauer to Dr. Marc A. Quillen because of his expertise in that area.

5. Dr. Quillen, a clinical psychologist and neuropsychologist, first saw Mr. Bauer in April 1996 and initially treated him until August 1996. The doctor administered a number of psychological tests that indicated Mr. Bauer had problems with processing information rapidly or in stressful situations, a mild concentration deficit, and a slight memory deficit. The doctor administered, in his opinion, the best test for determining brain damage. The results from that test showed a significant level of impairment as three of four cardinal indicators for brain impairment fell in the impaired range. Further, the doctor noted that the headaches that Mr. Bauer experienced post-injury were consistent with a closed head injury. Dr. Quillen diagnosed traumatic brain injury and depressive disorder secondary to that injury.

6. Dr. Quillen saw Mr. Bauer again in late September 1996, January 1997, and March 1998. In January 1997 Mr. Bauer reported that he was experiencing shakes, weakness, and had suicidal ideas. Although the shakes began months before, they were becoming more frequent and disabling. The doctor believes Mr. Bauer reached a point where he could no longer work. And that neither medication nor psychotherapy could cure him but only ameliorate his symptoms.

7. By letter dated October 14, 1997, Mr. Townsley, the attorney representing Utility Contractors and its insurance carrier in this proceeding, requested clinical psychologist Dr. Theodore A. Moeller to evaluate Mr. Bauer. The doctor met with Mr. Bauer on two or three occasions in March 1998 and administered additional psychological tests. Dr. Moeller concluded that Mr. Bauer's symptoms of fatigue, anxiety, and loss of concentration were genuine and that Mr. Bauer was not malingering. The doctor did not express an opinion whether Mr. Bauer had experienced brain damage as a result of the July 1995 accident as he deferred to Dr. Quillen and Dr. Mitchel A. Woltersdorf, another neuropsychologist that evaluated Mr. Bauer for Utility Contractors and its insurance carrier. Further, at his deposition, Dr. Moeller testified that Dr. Quillen was a competent and capable neuropsychologist.

8. As indicated above, Dr. Woltersdorf met with and evaluated Mr. Bauer in June 1998. The doctor found no signs of depression and no indication of any traumatic brain injury. Although he thinks Mr. Bauer is exaggerating his symptoms, the doctor would not label him a malingerer. At his deposition, Dr. Woltersdorf also testified that Dr. Quillen was a competent neuropsychologist.

9. After reviewing Mr. Bauer's medical records, Dr. Ruthven testified that he found no evidence of a closed head injury and concluded that Mr. Bauer was consciously exaggerating his symptoms and malingering. When asked to identify what secondary gain Mr. Bauer might have, the doctor responded that Mr. Bauer probably enjoyed fooling people. The doctor testified, in part:

. . . And I think I have an opinion, but it is speculation. And I think you are right. I don't think it is financial as such. So there has to be some other nonfinancial gain that Mr. Bauer could be receiving by actively portraying himself as a disabled person and when he is not. And I have an opinion, but it is speculation. It is very difficult to read into this man's mind. We have clues about his behavior. But I would think it is more likely in this area of Mr. Bauer getting a profound sense of satisfaction in some way by fooling people, by playing a role, consciously playing a role, of getting some kind of satisfaction, ego gratification, from being able to fool people, fool very educated, well-trained physicians and psychologists and others, his family or whatever, getting some kind - - because you are right. It has to be some kind of ego satisfaction. . . . And just pulling the wool over people's eyes and just laughing up his sleeve and playing this role and who knows. Are there theatrical kind of interests he has or talents or whatever that have not been - - he has not been able to implement in his life or whatever. But that is what I would say. He gets a kick out of this.

10. Considering the various expert opinions, the Board finds that Mr. Bauer sustained a closed head injury in the July 1995 accident that as of February 1, 1997, had rendered him permanently and totally disabled. In reaching this conclusion, the Board was persuaded by Dr. Quillen's testimony and opinions.

11. Mr. Bauer's separation date from Utility Contractors was January 31, 1997. Before that date, the company paid Mr. Bauer full wages for any periods that he missed work due to the injuries he sustained in his work-related accident.

12. The Board agrees with the Judge's findings that Mr. Bauer was temporarily and totally disabled from July 15, 1995 through September 10, 1995; and January 23, 1996 through February 2, 1996. The parties do not contest those findings.

13. The Judge ordered an independent medical evaluation to be performed by Dr. Philip R. Mills. In his letter to the Judge dated April 29, 1998, Dr. Mills stated that he evaluated Mr. Bauer on that date and found, utilizing the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment, he had a 21 percent whole body functional impairment for the lower and upper extremity injuries that he sustained in the July 1995 accident. The Board is persuaded by Dr. Mills' opinions and finds them more credible than those of Dr. Pedro A. Murati, Dr. Morris, and Dr. Klaumann, who also provided opinions of Mr. Bauer's functional impairment. Considering all of the expert medical testimony, the Board finds that Mr. Bauer sustained a 21 percent whole body functional impairment as a result of the physical injuries he received on July 14, 1995.

14. The Board adopts the Judge's findings as set forth in the Award to the extent they are not inconsistent with the above.

**CONCLUSIONS OF LAW**

1. The Award should be modified to grant Mr. Bauer a 21 percent permanent partial general disability for the period through January 31, 1997, and a permanent total disability for the period commencing February 1, 1997.

2. Utility Contractors and its insurance carrier contend the Judge erred by failing to quash Dr. Moeller's deposition. They cite K.S.A. 60-226(b)(4)(B), which provides:

A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in K.S.A. 60-235 and amendments thereto or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

3. The Board concludes that the Judge did not err by allowing Dr. Moeller's deposition. First, because the Workers Compensation Act is complete and exclusive, the rules and methods contained in the Kansas Code of Civil Procedure that are not included in the Act are not applicable. The Kansas Supreme Court in Jones<sup>1</sup> stated:

Kansas appellate decisions are replete with statements that the Workers Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete, and exclusive. We must look to the procedure of the Act for the methods of its administration. Rules and methods provided by the Kansas Code of Civil Procedure not included in the Act itself are not available in determining rights thereunder.

Second, the Act itself provides that there is no privilege preventing a health care provider from testifying, except when the provider fails to provide the injured worker with a copy of the evaluation report after a proper request. The Act provides:

Except as provided in this section, there shall be no disqualification or privilege preventing the furnishing of reports by or the testimony of any health care provider who actually makes an examination or treats an injured employee, prior to or after an injury.<sup>2</sup>

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<sup>1</sup> Jones v. Continental Can Co., 260 Kan. 547, 920 P.2d 939, Syl. 3 (1996).

<sup>2</sup> K.S.A. 44-515(d).

Therefore, the Judge correctly determined that Mr. Bauer could take Dr. Moeller's deposition and enter it into the evidentiary record.

4. Based upon the above findings, Mr. Bauer is entitled to receive temporary total disability benefits for the periods of July 15, 1995 through September 10, 1995; and January 23, 1996 through February 2, 1996. For those periods that Mr. Bauer was not temporarily and totally disabled between July 15, 1995 and February 1, 1997, Mr. Bauer is entitled to receive benefits for a 21 percent permanent partial general disability. Commencing February 1, 1997, Mr. Bauer is entitled to receive permanent total disability benefits.

5. Utility Contractors and its insurance carrier are entitled to receive a credit for the unearned wages paid to Mr. Bauer while he was off work for these injuries in excess of the amount of temporary total disability benefits to which he was entitled. The Act provides:

If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.<sup>3</sup>

### **AWARD**

**WHEREFORE**, the Appeals Board modifies the October 30, 1998 Award as follows.

Michael A. Bauer is granted compensation from Utility Contractors, Inc., and its insurance carrier for a July 14, 1995 accident and resulting disability. Based upon a \$632.93 average weekly wage, Mr. Bauer is entitled to receive 10 weeks of temporary total disability benefits at \$326 per week, or \$3,260, followed by 81.14 weeks of permanent partial disability benefits at \$326 per week, or \$26,451.64, for a 21 percent permanent partial general disability.

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<sup>3</sup> K.S.A. 44-510f(b).

Commencing February 1, 1997, Mr. Bauer became permanently and totally disabled and, therefore, is entitled to receive \$326 per week until his total award equals \$125,000.

As of July 2, 1999, there would be due and owing to the claimant 10 weeks temporary total compensation at \$326 per week in the sum of \$3,260, plus 81.14 weeks permanent partial compensation at \$326 per week in the sum of \$26,451.64, plus 116 weeks of permanent total compensation at \$326 per week in the sum of \$37,816, for a total due and owing of \$67,527.64, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$57,472.36 shall be paid at \$326 per week until further order of the Director.

Utility Contractors and its insurance carrier are entitled to receive a credit pursuant to K.S.A. 44-510f(b).

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: E.L. Lee Kinch, Wichita, KS  
William L. Townsley III, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director